# Southern Estate Sdn Bhd & Anor v Tractors Malaysia Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO S-02-198 OF 1994

LAMIN PCA, MAHADEV SHANKAR AND AHMAD FAIRUZ JJCA

6 AUGUST 1996

***Civil Procedure*** *— Res judicata — Cause of action estoppel — Parties in present suit same as two previous suits in respect of same matters — Whether present suit prevented by cause of action estoppel*

***Civil Procedure*** *— Fraud — Standard of proof in civil action — Whether proof beyond reasonable doubt*

In October 1969, Tractors Malaysia Bhd ('the respondent') sued Southern Estate Sdn Bhd ('the first appellant') for non-payment of rental under 19 hire agreements ('the agreements') entered into between the parties ('the first suit'). Judgment was entered against the first appellant in December 1969. At the same time, the respondent also took action against the director and owner of the first appellant ('the second appellant') suing him as guarantor under a guarantee agreement in which he guaranteed the repayment by the first appellant its debts arising out of the agreements ('the second suit'). Judgment was entered against the second appellant, and subsequently the respondent commenced execution proceedings against the second appellant by issuing a prohibitory order against his lands. In May 1972, the second appellant filed a writ against the respondent ('the third suit') and sought, inter alia, to set aside the final judgment and the prohibitory order. The respondent successfully applied to have the action struck out. The second appellant appealed to the Federal Court which allowed his appeal. On appeal to the Privy Council, the decision of the Federal Court was reversed. In March 1978, the appellants filed another action against the respondent in the High Court, alleging that the latter had fraudulently induced the first appellant to enter into the agreements by representing to them that the 19 units of logging equipment were sold to them on hire-purchase terms and those agreements turned out to be hiring agreements. The alleged fraudulent misrepresentation was said to have emanated from three letters. The appellants claimed, inter alia, for the rescission of the agreements and for the judgment entered into by the respondent against the appellants in the first and second suits and all subsequent orders and execution issued thereunder be set aside. The respondent denied the allegation of fraud or fraudulent misrepresentation, and alternatively pleaded that the matter contained in the statement of claim was res judicata and that the appellants were estopped from taking the present action. The High Court judge decided in favour of the respondent. The appellants appealed.

**Held,** dismissing the appeal with costs:

(1) The onus of proof of fraud in Malaysia is proof beyond reasonable doubt. In this case, the fraudulent misrepresentation had not been established beyond reasonable doubt (see pp 459F and 460A–C); *Saminathan v Pappa* [1981] 1 MLJ 12 followed.

(2) The court agreed with counsel for the respondent that the issues in this appeal were basically questions of fact. And it was a finding of fact that the appellants' allegation of fraud and fraudulent misrepresentation against the respondent was the second appellant's mere averment not borne out or supported by the letters (see p 460D–E).

(3) There was no mistake at all as to the status of all the logging equipment under the agreements. They were 'let on hire'. The letters relied on by the appellants in establishing the allegation of fraudulent misrepresentation stated the terms in the nature of 'hire-purchase terms' and they referred to the Bintulu project whereas the present case related to the Lahad Datu project (see pp 460I and 461A–B).

(4) It was clear from the evidence of the second appellant that he could have raised the issue regarding the agreements not being hire-purchase agreements when the first suit was filed. He could also have raised it in the third suit. The failure to do so must have the effect that the appellants are now estopped from raising it (see p 462H).

(5) The doctrine of res judicata by way of per rem judicatum (ie cause of action estoppel) applied as the parties in the present suit were the same as in the first and second suits and in respect of the same matters. The appellants failed to show special circumstance so as to bring the present case within the exception so that the appellants would not be estopped from raising the same issues (see pp 462I and 463A); *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 followed and *Arnold v National Westminster Bank plc* [1991] 3 All ER 41 distinguished.

**[Bahasa Malaysia summary**

Pada bulan Oktober 1969, Tractors Malaysia Bhd ('penentang') menyaman Southern Estate Sdn Bhd ('perayu pertama') kerana tidak membayar sewa di bawah perjanjian penyewaan ('perjanjian tersebut') yang diikat di antara pihak-pihak itu ('tindakan pertama'). Penghakiman dimasukkan terhadap perayu pertama pada bulan December 1969. Pada masa yang sama, penentang juga mengambil

tindakan terhadap pengarah dan pemunya perayu pertama ('perayu kedua'), menyamannya sebagai penjamin di bawah perjanjian gerenti di dalam mana dia menjamin pembayaran balik oleh perayu pertama hutang-hutangnya yang berbangkit daripada perjanjian tersebut ('tindakan kedua'). Penghakiman dimasukkan terhadap perayu-perayu, dan penentang kemudiannya memulakan prosiding pelaksanaan terhadap perayu kedua dengan mengeluarkan perintah larangan terhadap hartanya. Pada bulan Mei 1972, perayu kedua memfailkan writ terhadap penentang ('tindakan ketiga') dan menuntut, antara lain, untuk mengetepikan penghakiman muktamad dan perintah larangan tersebut. Penentang berjaya memohon supaya tindakan itu dibatalkan. Perayu kedua merayu kepada Mahkamah Persekutuan yang membenarkan rayuannya. Majlis Privi mengakas keputusan Mahkamah Persekutuan. Pada bulan March 1978, perayu-perayu memfailkan satu tindakan lagi di Mahkamah Tinggi terhadap penentang, mengatakan bahawa penentang telah dengan cara fraud mendorong perayu pertama untuk mengikat perjanjian tersebut dengan menyatakan kepada mereka bahawa 19 unit peralatan pembalakan dijual kepada mereka atas terma-terma sewa beli dan perjanjian tersebut adalah sebenarnya perjanjian penyewaan. Salah nyata fraud itu dikatakan datang dari tiga pucuk surat. Perayu-perayu menuntut, antara lain, pembatalan perjanjian tersebut dan penghakiman yang dimasukkan oleh penentang terhadap perayu-perayu dalam tindakan pertama dan kedua dan semua perintah-perintah dan pelaksanaan yang dikeluarkan dibawahnya diketepikan. Penentang menafikan pengataan fraud atau salah nyata fraud dan secara alternatif memplid bahawa perkara yang terkandung di dalam pernyataan tuntutan adalah res judicata dan bahawa perayu-perayu diestop daripada mengambil tindakan ini. Hakim Mahkamah Tinggi membuat keputusan yang memihak kepada penentang. Perayu-perayu membuat rayuan.

**Diputuskan**, menolak rayuan dengan kos:

(1) Tanggungjawab pembuktian fraud di Malaysia ialah pembuktian melampaui keraguan yang munasabah. Dalam kes ini, salah nyata fraud tidak dibuktikan melampaui keraguan yang munasabah (lihat ms 459F dan 460A–C); *Saminathan v Pappa* [1981] 1 MLJ 12 diikut.

(2) Mahkamah bersetuju dengan peguam penentang bahawa isu dalam rayuan ini adalah pada asasnya adalah persoalan fakta. Dan adalah suatu penemuan fakta bahawa pengataan fraud dan salah nyata fraud oleh perayu-perayu terhadap penentang hanyalah penegasan semata-mata yang tidak berbangkit atau disokong oleh surat-surat itu (lihat ms 460D–E).

(3) Tidak ada langsung kesilapan berkenaan dengan status peralatan pembalakan itu di bawah perjanjian tersebut. Peralatan itu 'disewakan'. Surat-surat yang digunakan oleh perayu-perayu dalam membuktikan pengataan fraud menyatakan terma-terma dalam bentuk 'terma-terma sewa beli' dan ianya merujuk kepada projek Bintulu sedangkan kes sekarang berkaitan dengan projek Lahad Datu (lihat ms 460I dan 461A–B).

(4) Adalah jelas daripada keterangan perayu kedua bahawa dia boleh membangkitkan isu berkenaan perjanjian tersebut bukan perjanjian sewa beli apabila tindakan pertama difailkan. Dia juga boleh membangkitkannya dalam tindakan ketiga. Kegagalan berbuat demikian mengakibatkan perayu-perayu diestop daripada membangkitkannya sekarang (lihat ms 462H).

(5) Doktrin res judicata secara per rem judicatum (iaitu estoppel kausa tindakan) adalah terpakai kerana pihak-pihak dalam guaman sekarang adalah sama dengan tindakan pertama dan kedua dan berkenaan dengan perkara yang sama. Perayu-perayu gagal untuk menunjukkan keadaan-keadaan yang istimewa untuk membawa kes sekarang dalam pengecualian supaya perayu-perayu tidak diestop daripada membangkitkan isu yang sama (lihat ms 462I dan 463A); *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 diikut and *Arnold v National Westminster Bank plc* [1991] 3 All ER 41 dibeza.]

**Notes**

For cases on res judicata, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2892–2939.

For cases on estoppel, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1208–1245.

For a case on standard of proof of fraud in civil action, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1408.

**Cases referred to**

*Arnold v National Westminster Bank plc* [1991] 3 All ER 41

*Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189

*Hornal v Neuberger Products Ltd* [1957] 1 QB 247

*Saminathan v Pappa* [1981] 1 MLJ 121

**Appeal from**: Civil Suit No 190 of 1978 (High Court, Kota Kinabalu)

*BE Teh* and *Anuar Dato' Ghani* (*Anuar Datuk Ghani & Associates*) for the appellants.

*Norbert Yapp* (*Jayasuriya Kah & Co*) for the respondent.

*Cur Adv Vult*

**Lamin PCA** (delivering the judgment of the court): Before hearing the appeal proper, learned counsel for the appellants informed the court that he wished to withdraw his motion dated 7 January 1995 — in which he applied for a stay of execution of the judgment obtained on 27 December 1969 in respect of Civil Suit No 190 of 1969 and a stay of the public auction due to take place on 14 January 1995 — on the grounds that the land had been auctioned and therefore, it was already academic. Accordingly, the motion was struck out.

Now, the present appeal has some historical background which began with the filing of Civil Suit No 189 of 1969 in the High Court of Kota Kinabalu, Sabah in October 1969 by Tractors Malaysia Bhd ('TMB') against Southern Estate Sdn Bhd ('Southern Estate') claiming for the sum of RM2,052,976.68 being money due as a result of three months in default payment under 19 hire agreements entered into between TMB and Southern Estate on 1 October 1967. The 19 hire agreements were in respect of 19 units of machinery such as tractors supplied on hire by TMB to Southern Estate for the purpose of carrying out timber logging operations including the costs of their repossession. In that suit, TMB also claimed the sum of RM245,641.07 in respect of tractor parts supplied and services rendered to Southern Estate. Southern Estate filed a defence admitting liability to the extent of RM959,896.92 in which judgment was entered on 27 December 1969.

At the same time, TMB took out another writ in the same High Court vide Civil Suit No 190 of 1969 against the director and owner of Southern Estate, Tio Chee Hing ('Tio'), suing him as guarantor under a guarantee agreement dated 21 November 1968 for the sum of RM1,978,933.36. The agreement was for Tio to guarantee the repayment by Southern Estate its debts arising out of the 19 hire agreements and TMB was to forbear from suing Southern Estate for the recovery of the debts on the following conditions:

> 2 No demand to the guarantor for the immediate full payment of the debt shall be made so long as the guarantor complies with each and every one of the following conditions:
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> (3) At the request of the company the guarantor shall execute a charge or a second charge as the case may be in respect of all lands owned by the guarantor and shall cause the hirer to execute a charge or a second charge as the case may be in respect of all lands owned by the hirer subject in every case to any consent that may be required of any charges and pending the execution of such charges the guarantor shall not and undertakes to ensure that the hirer shall not create new or further charges in respect of the lands owned by them respectively without consent of the company provided that

the provisions of this paragraph shall not apply to the lands comprised in the guarantor's new town project at Lahad Datu; A

(5) The guarantor shall pay monthly to the company towards the discharge of the debt as aforesaid the sum of RM50,000 (Ringgit Malaysia Fifty Thousand), the first payment to be made on 15 March 1969 and thereafter on the first day of each succeeding month. B

Tio admitted liability and judgment was entered on the same date, ie 27 December 1969 for the sum of RM718,266.85. Subsequently, TMB commenced execution proceedings against Tio by issuing a prohibitory order against his lands. On 16 May 1972, Tio filed a writ in Civil Suit No 199 of 1972 against TMB and sought, inter alia, to set aside the order granting leave to enter final judgment dated 27 December 1969 in Civil Suit No 190 of 1969 and the prohibitory order. Tio further prayed for two declarations; namely, that the final judgment entered be set aside and that the guarantee agreement was null and void for lack of consideration. Tio also claimed damages for fraudulent misrepresentation. TMB successfully applied to the High Court to have Civil Suit No 199 of 1972 struck out on the ground that in the words of the learned judge Lee Hun Hoe J (as he then was) (His Lordship's unreported judgment at p 111 of TMB's bundle of authorities): C D E

> The court will not allow itself to be used as a vehicle to defeat the course of justice in the hope of delaying the execution of a judgment and saving a grandiose project.

Tio appealed to the Federal Court which allowed his appeal. TMB took up the matter further by going up to the Privy Council. The Privy Council reversed the decision of the Federal Court and restored Lee Hun Hoe J's decision. F

Not satisfied with the decision of the Privy Council, Tio and Southern Estate filed the present action against TMB on 2 March 1978. In that action, TMB was alleged to have fraudulently induced Southern Estate to enter into the same 19 hire agreements. The alleged fraudulent misrepresentation was said to have emanated from three letters. (They appear from pp 149–155 of the appeal record). In paras 16 and 17 of the statement of claim, they alleged that: G

16 The plaintiffs for many years acted without knowledge of the said fraud of the defendants and the second plaintiff brought proceedings in the High Court at Kota Kinabalu in Civil Suit No 199 of 1972 against the defendants to set aside the judgment obtained against him in Civil Suit No 190 of 1969. The said proceedings in Civil Suit No 199 of 1972 were, however, unsuccessful. H

17 The plaintiffs have since discovered the fraud sometime in June 1977. I

As a result, they claimed that they had suffered damages and they therefore sought, inter alia:

(a) the rescission of the 19 agreements;

(b) damages;

(c) the orders made in Civil Suit Nos 189 of 1969 and 190 of 1969 be set aside; and

(d) the memorandum of charge in respect of their lands be cancelled and expunged from the register of the land office.

In their statement of defence dated 24 April 1978, TMB denied the allegation of fraud or fraudulent misrepresentation and contended that the matters or issues contained in the statement of claim were res judicata and that the appellants were estopped from taking the present action.

At the conclusion of the appellants's case in the court below, ie of the present suit (now on appeal before us), TMB's counsel made a submission of no case to answer.

The learned counsel for the appellants submitted on the legal standard of proof on fraudulent misrepresentation and attempted on facts to show how TMB led his clients to believe that they had entered into hire-purchase agreements and not hire agreements. The learned counsel cited textbook writers and the English case of *Hornal v Neuberger Products Ltd* [1957] 1 QB 247 in order to show the standard of proof required in the case of fraud. In *Hornal*, it was decided that in an action for damages for fraud, the standard of proof is the civil standard of a preponderance of probability, and that too was not an absolute standard for the degree of probability which a court required might vary according to the gravity fo the allegations to be proved.

In Malaysia, the standard of proof required to prove fraud is well-settled as illustrated in the case of *Saminathan v Pappa* [1981] 1 MLJ 121. In that case, the respondent (Miss Pappa) filed a suit in the High Court below for a declaration that she was the registered proprietor of a piece of land and prayed for vacant possession and other reliefs. Her claim was dismissed by the trial judge and she appealed to the Federal Court and her appeal was allowed. Saminathan, the appellant, appealed to the Privy Council and his appeal was dismissed.

When the appeal came before the Federal Court, the then Lord President, Tun Suffian, had this to say (at p 122):

> Now as to the law, it is clear from s 340 of the National Land Code that the plaintiff's title to the land in dispute is indefeasible, but it may be defeated in case of fraud or misrepresentation to which she was a party or where registration was obtained by means of an insufficient or void instrument.
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> ...

And at p 123:

> As the plaintiff's name is on the register and the defendant wanted it removed, in my judgment the burden is on the defendant to prove fraud or misrepresentation to which the plaintiff was a party, or that the registration of the plaintiff as proprietor was obtained by means of an insufficient and void instrument.

> As regards fraud, the defendant must prove it not on a balance of probabilities but *beyond reasonable doubt*: see the Privy Council case of *Narayanan v Official Assignee, Rangoon* 1941 PC 93.

The Federal Court found that Saminathan had failed to satisfy the court beyond reasonable doubt that Miss Pappa was guilty of fraud. On appeal to the Privy Council, Lord Diplock, delivering the judgment of the board, confirmed the standard of proof to be applied and said (at p 126):

> Only one allegation of fraud was made in Saminathan's pleading viz that Miss Pappa had misrepresented to the collector of land revenue that Saminathan desired the transfer of the title of the disputed land to her. There is a sentence in the trial judge's judgment which suggests that he found this allegation proved but counsel for Saminathan has been unable to point to even a shred of evidence that any such representation, whether true or false, was ever made to the collector. *The onus of proof of fraud in Malaysia is proof beyond reasonable doubt.* In the circumstances the Federal Court were clearly entitled, if not bound, to reject, as they did, the judge's finding on this matter.

In the present appeal before us, the learned counsel for TMB contended that the issues in this appeal are basically questions of fact. We agree. In para 22 of his written judgment, the learned judge made his findings of fact thus:

> With respect on the evidence before me as a whole, in its totality I find the plaintiffs' allegation of fraud, fraudulent misrepresentation against the defendants is the second plaintiff's mere averment, oral evidence, vacillatory at times, not borne out, not supported by PBD 8, PBD 11 and PBD 13, the plaintiff's own documentary evidence.

In paras 3 and 5 of their statement of claim, the plaintiffs/appellants alleged:

> 3 In order to induce the plaintiffs to make the alleged contracts, the defendants had orally, as well as in writing, represented to the plaintiffs that the 19 units of logging equipment were sold to them on hire purchase terms as hereinbefore mentioned.
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> 5 In truth and in fact the representations were false and untrue in that the 19 contracts turned out to be hiring agreements with unconscionable terms.

We note that in each of the five agreements (only five of 19 agreements were produced as exhibits), cl 1 clearly provided that the owners (ie TMB) 'shall let' and the hirer (ie Southern Estate) shall take on hire'. In the guarantee agreement of 21 November 1968 — in which the second appellant (Tio) as the guarantor guaranteed the 'debts' in respect of the 19 agreements, the preamble therein states:

> WHEREAS at the request of the guarantor the company *let on hire* to Southern Estates Sdn Bhd ...

There was no mistake at all as to the status of all the logging equipment under the 19 agreements. They were 'let on hire', whereas two of the three

letters talked about the terms in the nature of 'hire-purchase terms' — namely, those of 7 January 1967 (PBD 8) and 10 July 1967 (PBD 13) — and they both referred to the Bintulu project. The other letter of 24 February 1967 (PBD 11) talked about aspects of delivery of the machinery also for the Bintulu project, whereas the present case related to the Lahad Datu project. Two of the letters (PBD 11 and PBD 13) were clearly directed to Tio himself. He cannot come now to say that he did not understand their contents in that they were meant for the Bintulu project.

The learned counsel for TMB submitted that the present case related to projects in Lahad Datu, whereas the three letters referred to those in Bintulu. Very clearly, the letters talked about the machine requirements for the Bintulu Area timber concession. In fact, two of the letters were headed 'Bintulu Area Timber Concession'. In the examination-in-chief, Tio (the second appellant) admitted that there was a project in Bintulu, another timber concession of 96,900 acres. No doubt it was obtained by Southern Timber Contractor and not Southern Estate but Southern Timber Contractor was solely owned by him; whereas in cl 4 of each of the 19 agreements, it was clearly stated that the hirer (ie Southern Estate) 'will keep the said machinery safely and properly housed at Lahad Datu' and 'will not remove the same without the previous consent in writing of the owners'. Obviously, the machinery and equipment were meant to be used in Lahad Datu. In his evidence before the court, he agreed that he ordered 25 units and upon delivery, 19 units were used in Sabah — meaning Lahad Datu — and six units were sent to Bintulu. He also agreed that he signed all the 19 separate agreements; while the six other agreements in respect of the six machinery that were sent to Bintulu he admitted that they were signed in Bintulu by the person in charge of Southern Timber Contractor.

The learned counsel for TMB contended that the appellants had failed to establish fraudulent misrepresentation on the part of TMB. The present case related to a project in Lahad Datu, whereas the three letters concerned the project in Bintulu. In the cross-examination before the trial judge, the Tio admitted that there was such a project in Bintulu. The terms of the transaction for the Bintulu project were clearly spelt out in at least two of the letters. In the cross-examination before the trial judge, Tio attempted to contradict the terms contained in the letter of 7 January 1967 (PBD 8). This was dealt with by the trial judge, as can be seen from his grounds of judgment at p 17 paras 23 and 24.

TMB pleaded in the alternative res judicata; and on this subject we were referred to a couple of cases, one of which was *Arnold v National Westminster Bank plc* [1991] 3 All ER 41. The House of Lords explained in detail the concept and issues involved especially on the distinction between the cause of action estoppel and issue estoppel. In that case, the lessees commenced proceedings seeking rectification of the lease and a determination as to the true construction of the rent review clause on the ground that subsequent cases had shown the judge's construction of that

clause to be wrong. The landlords applied to strike out the claim on the ground that there was an issue estoppel between the parties which prevented the lessees from relitigating the matter. The application was dismissed by the court below on the ground that a subsequent change in the law was capable of bringing the case within the exception to the doctrine of issue estoppel. The landlords' appeal to the Court of Appeal was dismissed. The landlords' subsequent appeal to the House of Lords was again dismissed. Lord Keith of Kinkel (at p 52) had this to say:

> Upon the whole matter I find myself in respectful agreemment with the passage in the judgment of Sir Nicholas Browne-Wilkinson V-C where he said ([1988] 3 All ER 977 at p 983):
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> > 'In my judgment a change in the law subsequent to the first decision is capable of bringing the case within the exception to issue estoppel. If, as I think, the yardstick of whether issue estoppel should be held to apply is the justice to the parties, injustice can flow as much from a subsequent change in the law as from the subsequent discovery of new facts. In both cases the injustice lies in a successful party to the first action being held to have rights which in fact he does not possess. I can, therefore, see no reason for holding that a subsequent change in the law can *never* be sufficient to bring the case within the exception. Whether or not such a change does or does not bring the case within the exception must depend on the exact circumstances of each case.' (Emphasis added.)
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> I am satisfied, in agreement with both courts below, that the instant case presents special circumstances such as to require the respondents to be permitted to reopen the question of construction decided against them by Walton J, that being a decision which I regard as plainly wrong.

The appeal before us arose out of an action filed by both appellants in the High Court at Kota Kinabalu on 3 April 1978 against TMB. It was a suit claiming, inter alia, for the rescission of the 19 agreements and for the judgment entered into by TMB against both appellants in Civil Suit No 189 of 1969 and Civil Suit No 190 of 1969 and all subsequent orders and execution issued thereunder be set aside. On 28 October 1969, TMB sued Southern Estate for non-payment of rental under the same 19 agreements vide Kota Kinabalu High Court Civil Suit No 189 of 1969. On the same day, TMB filed a suit vide Kota Kinabalu High Court Civil Suit No 190 of 1969 against Tio under the guarantee agreement of 21 November 1968 for failure to settle the sum due under Civil Suit No 189 of 1969 arising out of the 19 agreements. It is quite clear from the evidence of the second appellant that he could have raised the issue regarding the 19 agreements not being hire-purchase agreements when Civil Suit No 189 of 1969 was filed. He could also have raised it in Civil Suit No 199 of 1972. The appellant's failure to do so must have the effect that they are now estopped from raising it. The counsel for TMB contended that the appellants also failed to show special circumstance as in *Arnold*'s case so as to bring the present case within the exception so that the appellants would not be estopped from raising the same issues. Accordingly, he submitted the case would be res judicata by way of issue estoppel. Also he contended that on

A the authority of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, the doctrine of res judicata by way of per rem judicatum (ie cause of action estoppel) applied as the parties in the present suit were the same as in the other two suits, namely, Civil Suit Nos 189/69 and 190/69 and in respect of the same matters.

B After hearing submissions from both sides, we unanimously found that res judicata applied, and if we were wrong in this, the appeal must also fail on the ground that fraudulent misrepresentation had not been established beyond reasonable doubt. Accordingly, we dismissed the appeal with costs. As counsel for TMB informed us that he wished to withdraw his cross-appeal, we therefore struck out the cross-appeal.

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*Appeal dismissed.*

Reported by Tee Boon Cheong

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